He brought suit in the Court of Claims for the difference between the pay at the rate of an army officer "not mounted" already received by him, and the rate for such officer "mounted." The court gave judgment in his favor for the amount claimed and the United States took this appeal.

The case depends upon the construction of the statutes for the pay of officers of the army as applied to the navy by Section 13 of the Navy Personnel Act. The question of contemporaneous construction is also involved. The statutes as well as the decisions of the Court of Claims and the Controller thereunder will now be stated.

Statutes.

Navy Personnel Act (March 3, 1899, Section 13, 30 Stat. L. 1007):

SEC. 13. "That, after June 30th, 1899, commissioned officers of the line of the navy and of the Medical and Pay Corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army."

Medical Corps of Army.

At the time of the passage of the Personnel Act, the following provision of law regarding the Medical Department of the army was in force as a portion of "An Act reorganizing the several staff corps of the army," approved June 23, 1874 (18 Stat. L. 244)—superseding the provision of Rev. Stat. § 1168 on the same subject.

SEC. 4. That the Medical Department of the Army shall hereafter consist of * * * * fifty surgeons, with the rank, pay, and emoluments of majors; one hundred and fifty assistant surgeons, with the rank, pay, and emoluments of lieutenants of cavalry for the first five years' service, and with the rank, pay, and emoluments of captains of cavalry after five years' service."

Assistant surgeons thus receive pay at mounted rates in the grades in which there is a distinction between "mounted" and "not mounted" pay. These grades are those of captains and lieutenants (Rev. Stat. Section 1261). Surgeons rank as majors, a grade in which no such distinction exists. The pay of a "captain, mounted," is $2,000 a year and of a "captain, not mounted," $1,800 a year (Rev.Stat. Section 1261, quoted in brief for the United States, page 4.)

Medical Corps of Navy.

The Revised Statutes provide as follows:

"SEC. 1368. The active list of the Medical Corps of the Navy shall consist of fifteen medical directors, fifteen medical inspectors, fifty surgeons, and one hundred assistant surgeons."

It will be seen that no separate office of passed assistant surgeon is here provided for. It is provided, however:

"SEC. 1371. No person shall be appointed surgeon until he has served as an assistant surgeon at least two years, on board a public vessel of the United States at sea, nor until he has been examined and approved for such appointment, by a board of naval surgeons, designated by the Secretary of the Navy."

Also by section 1474, it is provided that passed assistant surgeons shall have the relative rank of lieutenant or master and assistant surgeons the relative rank of master or ensign. (Title of "master" changed to "lieutenant, junior grade," March 3, 1883, 22 Stat. L. 472).

By section 1556, different rates of pay are provided respectively for surgeons, passed assistant surgeons and assistant surgeons of the navy. This provision is superseded by the comprehensive provision of the thirteenth section of the Personnel Act above quoted, which

provides that all officers of the Medical Corps shall be paid at the rates of pay provided for officers of corresponding rank in the army. By the seventh section of the Personnel Act, quoted in brief for the United States, p. 3, the words "the relative rank of" are changed to read "the rank of."

By the act of June 7, 1900, 31 Stat. L. 697, it is provided:

"The active list of surgeons shall hereafter consist of fifty-five, and that of passed assistant and assistant surgeons of one hundred and ten. Assistant surgeons shall rank with assistant surgeons in the army."

Court of Claims Decision in Richardson Case.

In *Richardson* v. *United States*, 38 C. Cls. 182, the Court of Claims had before it the question whether an assistant surgeon of the navy was entitled to be paid at the rate of an officer of corresponding rank in the army "mounted" or "not mounted." The court decided that he was entitled to be paid at the mounted rate. The following passage of the opinion gives the ground of the decision, 38 C. Cls. 193, 194:

"The Personnel Act of March 3, 1899, provides:

"'That after June 30, 1899, commissioned officers of the line of the navy and of the Medical and Pay Corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the army.'

"This statute, read in connection with section 1168 of the Revised Statutes, which provides 'that assistant surgeons shall rank with a lieutenant of cavalry for the first three years of service and with the rank of captain of cavalry after three years of service,' fixes the rank and pay of the claimant in this case.

"It is provided in the act of March 3, 1899, that the commissioned officers of the navy shall receive the same pay and allowances, except forage, of an officer of the cor-

responding rank in the army. The only exception in the act of 1899 against the officer in the navy is that he shall not receive forage, it being in contemplation of Congress that the navy officer was not necessarily a mounted officer, and, therefore, an exception is made against him in the allowance of forage.

"Section 1261 of the Revised Statutes provides that the officers of the army 'shall be entitled to the pay therein stated after their respective designations.' In those designations we find first and second lieutenants 'mounted' and 'not mounted,' thereby recognizing a condition applicable to officers of that class dependent upon whether they belong to the cavalry or the infantry service. A lieutenant in the cavalry is presumed to be mounted, a lieutenant in the infantry is presumed not to be mounted, and the classification of 'mounted' and unmounted pay was intended in a general way to mark a distinction between the pay of an officer engaged in the cavalry and an officer engaged in the infantry service. The 'mounted pay' was not an allowance but a part of the officer's pay proper, and the purposes of the personnel act of March 3, 1899, was to fix an equality of pay proper between the officers of the navy and the army corresponding in rank, where such pay is not qualified or changed, in the rate of pay of an officer in the army.

"The disallowance of forage was a discrimination against the officer of like grade or rank in the navy, because the necessity of forage did not exist, and, therefore, the right is not incident to the officer serving in the navy, but in all other particulars his pay was left equal to the officer of like rank in the army. The pay of the rank is taken as the basis of the pay of the claimant, and is not based upon the theory that he may be mounted, but upon the basis that mounted pay is designated as the measure of his compensation."

Decision of Controller of the Treasury.

The Court of Claims in Finding III, Record, page 3, finds as follows:

"Before the date of the decision of this court in the case of *Richardson* v. *The United States* (38 C. Cls. 182), January

5, 1903, assistant surgeons in the navy received only the pay of an officer of corresponding rank in the army 'not mounted.' By that decision it was held that they are entitled to the pay of such an officer 'mounted.' This decision was not appealed from and has been accepted as the proper interpretation of the law. It has been applied by ruling of the Comptroller of the Treasury to passed assistant surgeons.

"All officers of the Medical Corps in grades for which there is in the army pay table a distinction between 'mounted' and 'not mounted' pay, have ever since been paid at mounted rates of pay for their service from the date the personnel act took effect, July 1, 1899, to the present time."

In Finding I, page 3, the decision of the Controller referred to, is shown to be that in *Brownell's* case, 9 Cont. Dec. 676. The material portion of that decision is as follows: 9 Cont. Dec. 678, 679, 680:

"The above case has not been appealed to the Supreme Court and the claimant contends that under the above decision a passed assistant surgeon of the navy is entitled to receive mounted pay corresponding to his rank in the army. I do not think the problem here presented is solved by the Act of June 7, 1900, *supra.*

"Section 1261, Revised Statutes, provides that:

"'The officers of the army shall be entitled to the pay herein stated after their respective designations: * * * captain mounted, $2,000 a year; captain not mounted, $1,800 a year; first lieutenant mounted, $1,600 a year; first lieutenant not mounted, $1,500 a year; * * *

"The mounted pay was not an allowance, but part of the officer's pay proper. Section 1556 of the Revised Statutes provides:

"'The commissioned officers and warrant officers on the active list of the Navy of the United States * * * shall be entitled to receive annual pay at the rates herein stated after their respective designations: * * * passed assistant surgeons * * * during the first five years after date of appointment; when at sea, $2,000; on shore duty,

$1,800; on leave or awaiting orders, $1,500; after five years from such date: When at sea, $2,200; on shore duty, $2,000; on leave or awaiting orders, $1,700. Assistant surgeons * * * during the first five years after date of appointment, when at sea, $1,700; on shore duty, $1,400; on leave or awaiting orders, $1,000; after five years from such date, when at sea, $1,900; on shore duty, $1,600; on leave or waiting orders, $1,200.'

"Section 1474, Revised Statutes, provides:

"'Officers of the Medical Corps on the active list of the Navy shall have relative rank as follows: * * * passed assistant surgeons, the relative rank of lieutenant or master; assistant surgeons, the relative rank of master or ensign. * * *'

"Section 1466, Revised Statutes, provides:

"'The relative rank between officers of the navy, whether on the active or retired list, and officers of the army shall be as follows, lineal rank only being considered; * * * lieutenants with captains; masters with first lieutenants; ensigns with second lieutenants.'

"By the act of March 3, 1883 (22 Stat. 472), the title of the grade of master was changed to that of lieutenant, junior grade.

"By section 1474, Revised Statutes, we find that passed assistant surgeons are entitled to the relative rank of lieutenant or master, while assistant surgeons are entitled to the relative rank of master or ensign; and by section 1556, Revised Statutes, a higher rate of compensation was given passed assistant surgeons than assistant surgeons.

"Section 7 of the Personnel Act of March 3, 1899, provides:

"'That all sections of the Revised Statutes which, in defining the rank of officers or positions in the navy, contain the words 'the relative rank of' are hereby amended so as to read 'the rank of', but officers whose rank is so defined shall not be entitled, in virtue of their rank, to command in the line or in other staff corps.'

"The Personnel Act of March 3, 1899, *supra*, provides:

"'That after June 30, 1899, commissioned officers of the line of the navy and of the Medical and Pay Corps

shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the army.'

"By this provision Congress undertook to establish an equality of pay between officers of the army and officers of the navy corresponding in rank, and the true question here presented is, What is the rank of a passed assistant surgeon in the navy and to what officer in the army does he correspond in rank?

"His pay is attached to his rank.

"I do not think there is any ground for the distinction between assistant surgeons and passed assistant surgeons that would give mounted pay to one and deny it to the other.

"I am of opinion, and so decide, that a passed assistant surgeon in the navy, with the rank of lieutenant junior grade, corresponds in rank with an assistant surgeon in the army with the rank of a first lieutenant, and that a past assistant surgeon in the navy, with the rank of lieutenant, corresponds in rank with an assistant surgeon in the army with the rank of captain.

"The claimant being a passed assistant surgeon in the navy with the rank of lieutenant, is entitled to the pay of an officer of the corresponding rank in the army, to-wit, that of an assistant surgeon with the rank of captain, which is $2,000 per annum. He is entitled, therefore, to pay at the rate of $2,000 per annum, together with longevity pay."

This decision was rendered May 22, 1903.

According to the finding of the Court of Claims (Finding III, last paragraph, record, p. 3) all officers of the Medical Corps in grades for which there is in the army pay table a distinction between mounted and not mounted pay, that is, in the grades of lieutenant, lieutenant junior grade and ensign, corresponding to captain and first and second lieutenant in the army, have ever since been paid at mounted rates of pay for all their services from July 1, 1899, to the present time.

II. Brief of Argument.

Mounted Pay to Medical Corps.

The decision of the Court of Claims in the *Richardson* case, coupled with that of the Controller in *Brownell's* case, both of which have been fully quoted above, are so well reasoned as to leave little room for further argument.

A distinction is set up in the brief for the United States, between the *Richardson* case and the present, in that the *Richardson* case related only to assistant surgeons, while the claimant in the present case is a passed assistant surgeon.

What is a Passed Assistant Surgeon?

The Controller well states in his decision above quoted the reason for not making any such distinction. A passed assistant surgeon is only an assistant surgeon who has passed his examination. He is therefore embraced within the very terms of the provision of the act of June 7, 1900, that "assistant surgeons shall rank with assistant surgeons in the army." This point is well stated in the syllabus of a decision of the Attorney-General, 19 Opinions, 169:

"In the organization of the Medical Corps of the navy a passed assistant surgeon and an assistant surgeon are officers of one and the same *grade*, but belong to different classes in such grade.

"A passed assistant surgeon is simply an assistant surgeon who has been officially notified that he has passed successfully the examination necessary to be undergone before he can be appointed a full surgeon when a vacancy occurs."

It is true that passed assistant surgeons now receive a commission (act of February 13, 1897, 29 Stat. L. 526), but this does not change the essential character of the office, as shown by its title.

Decision of this Court.

In the case of *United States* v. *Crosley*, 196 U. S. 327, in part quoted in brief for the United States, pages 7 to 9, as authority against this case, the question of mounted pay to officers of the Medical and Pay Corps was carefully distinguished from that of mounted pay to an aid to a rear-admiral, 196 U. S. 334, 335.

"The contention of the appellee is that aids, duly appointed under this section, serving in the army, are entitled to this compensation whether required to be mounted or not. And further, that the language 'pay as mounted officers' is used in the paragraph rather with a view of fixing the amount to be paid than to characterize the service required. It is doubtless true that the terms mounted pay may be used in this sense. *Richardson* v. *United States*, 38 C. Cls. 182, is cited as an illustration of this use of the phrase. In that case it was held that an assistant surgeon in the navy was entitled to mounted pay under the Navy Personnel Act, because an assistant surgeon in the army was entitled thereto. Under section 1168 of the Revised Statutes, an assistant surgeon in the army ranked with a lieutenant of cavalry for the first three years of service and with a captain of cavalry after the expiration of that period. Under these provisions the assistant surgeon was held entitled to mounted pay.

"We are further cited to a decision of the Comptroller of the Treasury, 10 Comp. Dec. 523, holding that officers of the Pay Corps of the Navy are entitled to mounted pay, as officers of the Pay Corps of the Army are given by law cavalry or mounted pay. It may well be that in these cases mounted pay was descriptive of the compensation to be paid, and an officer may therefore be entitled to it, although he renders no mounted service.

"But the right of mounted pay to an aid to a rear-admiral, assuming that the Navy Personnel Act assimilates the compensation of an admiral's aid to that of an aid to a major-general in the army, depends upon whether an aid to a major-general under section 1301 of the

Army Regulations above quoted, although he renders no mounted service, and may not be required to be mounted, is entitled to such compensation."

After citing the Army regulation, the court proceeded to decide the case as set forth in the brief for the United States, pages 7 to 9.

The reference made to the decisions allowing mounted pay to officers of the Medical and Pay Corps, as above quoted, makes the decision of this court in the *Crosley* case an authority in favor of rather than against the contention of the claimant in the present case.

Same Kind of Pay to all Medical Officers.

Counsel for the United States concedes that the *Richardson* case is correct and that assistant surgeons in the navy are entitled to mounted pay (appellant's brief, p. 11). He makes this concession upon the ground that the act of June 7, 1900 (31 Stat. L. 697, quoted in appellant's brief, p. 11), declares that assistant surgeons shall rank with assistant surgeons in the army. Under the former statutes, assistant surgeons in the navy had the rank of ensign on appointment (Rev. Stat. § 1474), corresponding to army second lieutenant. This act gives them the same rank as army assistant surgeons on appointment, namely, that of naval lieutenants, junior grade, corresponding to army first "lieutenants of cavalry" (act of June 23, 1874, 18 Stat. L. 244, quoted, *ante*, p. 2).

The Court of Claims did not decide the *Richardson* case upon the act of June 7, 1900. It is not cited in the reasoning of the opinion. They placed their decision upon the provision in the Navy Personnel Act (§ 13, 30 Stat. L. 1007, quoted *ante*, p. 2), giving to naval officers the pay of officers of corresponding rank in the army and the provision of the act of June 23, 1874 (18 Stat. L. 244, *ante*, p. 2), giving to

assistant surgeons in the army the rank of officers of cavalry. The mounted pay follows this grant of rank, and the Court of Claims says that it is "designated as the measure of compensation." If the reasoning of the Court of Claims be correct, and the right of assistant surgeons in the navy to mounted pay be because mounted pay in the army is the measure of compensation, then no reason can be assigned why passed assistant surgeons in the navy are not equally entitled to the mounted pay received by officers of the Medical Corps of the Army of corresponding rank.

An assistant surgeon in the army may have duty requiring him to be mounted, but his rank is fixed as that of an officer of cavalry without the slightest regard to the question whether his duty requires him to keep a horse. The law gives him the cavalry rank and the consequent mounted pay whether he be assigned to mounted duty or not. The duties of assistant surgeons in hospitals, in attendance at posts or stations or otherwise, except in the field, do not require them to be mounted. The Court of Claims was therefore right in saying that the mounted pay is given as the measure of compensation. It was an expression in military terms of the purpose to pay to members of the Medical Corps a greater professional compensation than that paid to infantry officers, doubtless in part on account of the expense of a medical education and in part to meet the competition of the civil demand for the services of competent surgeons. The latter has made it difficult to secure and retain the services of qualified medical officers. (Senate Report No. 21, 59th Congress, 1st Session.

These reasons apply with equal force to assistant surgeons in the navy, and the Court of Claims enforced the principle of equal pay for corresponding service by giving the army rate of pay to assistant surgeons in the navy. The correctness of this conclusion was acquiesced

in by the Government; no appeal was taken to this court; the Controller accepted the decision of the Court of Claims, and all assistant surgeons in the navy, since July 1, 1899, about eight years, have received mounted pay.

The Controller took a further step, a mere corollary of the decision of the Court of Claims in the *Richardson* case. He recognized that it would be quite anomalous to ascribe to Congress the intention of giving mounted pay to assistant surgeons and to deny it to passed assistant surgeons. All medical officers of the army have cavalry rank and pay. The principle of equality would therefore give like pay to all medical officers of the navy.

Under this ruling all passed assistant surgeons in the navy have received mounted pay from July 1, 1899. (Finding III, Record, p. 3.)

Absurd Result of Distinction.

There is a special reason why Congress could have meant no such discrimination. The pay of officers of the Medical Corps, we have seen, is fixed by their rank and not by the office of assistant surgeon or passed assistant surgeon which they may hold. Section 1474, Rev. Stat., gives to assistant surgeons the rank of master (now lieutenant, junior grade) or ensign; to passed assistant surgeons the rank of lieutenant or master (now lieutenant, junior grade). There are thus some assistant surgeons and some passed assistant surgeons both holding the same rank or grade, that of lieutenant, junior grade. If the contention of the Government be correct, an assistant surgeon with the rank of lieutenant, junior grade, is entitled to the pay of a first lieutenant of cavalry in the army. When he becomes a passed assistant surgeon, receiving a promotion in office, without change in rank or grade by that promotion, he loses his right to mounted pay and

becomes entitled only to the pay of an officer not mounted. Thus the officer on promotion to a higher office would be reduced in pay. It is quite certain that Congress intended no such result.

If mounted pay is given in the lowest office of the Medical Corps, it was surely the intention of Congress to continue it until the office and rank is reached in which there is no distinction between mounted and unmounted pay, that is, the office of surgeon, with the rank of lieutenant-commander, corresponding to major in the army (R. S., §1474). The Controller declares this argument succinctly, saying (*ante*, p. 8):

"His pay is attached to his rank. I do not think there is any ground for the distinction between assistant surgeons and passed assistant surgeons that would give mounted pay to one and deny it to the other."

Contemporaneous Construction.

The Court of Claims has found (Finding III, Record, page 3), that under the decision of the Court of Claims in the *Richardson* case, made January 5, 1903, and that of the Controller in the *Brownell* case, decided May 22, 1903, all officers of the Medical Corps have received pay at mounted pay rates for their services from July 1, 1899, to the present time. Under these circumstances, it would now be inequitable in the extreme to declare all that has been done to be erroneous and require these officers to refund what has been received by them under such abundant sanction. Even this officer has received his mounted pay (Finding I, Rec., p. 3) for the period before and after that covered by this claim and is obliged to come into court only because of a technical rule of the Treasury Department.

In *United States* v. *Alabama Railroad Company*, 142 U. S. 615, this court said, page 621:

"We think the contemporaneous construction thus given by the executive department of the Government and continued for nine years through six different administrations of that department—a construction which, though inconsistent with the literalism of the act, certainly consorts with the equities of the case—should be considered decisive in this suit. It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the Government upon the faith of such construction may be prejudiced. It is especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such manner as to become retroactive, and to require from him the repayment of moneys to which he had supposed himself entitled, and upon the expectation of which he had made his contracts with the Government. These principles were announced as early as 1827 in *Edwards' Lessee* v. *Darby*, 12 Wheat. 206, 210, and have been steadily adhered to in subsequent decisions. *United States* v. *State Bank of North Carolina*, 6 Pet. 29, 39; *United States* v. *MacDaniel*, 7 Pet. 1; *Brown* v. *United States*, 113 U. S. 568; *United States* v. *Moore*, 95 U. S. 760, 763."

Again in *United States* v. *Finnell*, 185 U. S. 236, 244:

"It thus appears that the Government has for many years construed the statute of 1887 as meaning what we have said it may fairly be interpreted to mean, and has settled and closed the accounts of clerks upon the basis of such construction. If the construction thus acted upon by accounting officers for so many years should be overthrown, we apprehend that much confusion might arise. Of course, if the departmental construction of the statute in question were obviously or clearly wrong, it would be the duty of the court to so adjudge. *United States* v. *Graham*, 110 U. S. 219; *Wisconsin C. R'd Co.* v. *United States*, 164 U. S. 190. But if there simply be doubt as to the soundness of that construction—and that is the utmost that can be asserted by the Government—the

action during many years of the department charged with the execution of the statute should be respected, and not overruled except for cogent reasons. *Edwards* v. *Darby*, 12 Wheat. 206, 210; *United States* v. *Philbrick*, 120 U. S. 52, 59; *United States* v. *Johnston*, 124 U. S. 236, 253; *United States* v. *Alabama G. S. R'd Co.* 142 U. S. 615, 621. Congress can enact such legislation as may be necessary to change the existing practice if it deems that course conducive to the public interests."

In following the decision of the Court of Claims in *Richardson* v. *United States*, 38 C. Cls. 182, the Controller did only what was his duty to do. As was said by the Court of Claims in *Meigs* v. *United States*, 20 C. Cls. 181, 185, 186:

"Moreover, the decisions of the Court of Claims in general, not appealed from, are guides to the executive officers of the Government and furnish precedents for the executive departments in all other like cases."

After citing numerous statutes supporting that view, the court concludes, page 187:

"Thus the course of legislation unmistakably indicates the intention of Congress that the decisions of the Court of Claims shall be guides and precedents for the executive departments in all like cases."

This requirement that the accounting officers shall follow the decisions of this court and of the Court of Claims where not appealed from is made mandatory by a provision contained in the Sundry Civil Appropriation act of March 4, 1907. In this act, Congress, after making an appropriation for arrears of pay and bounty of volunteers, adds:

"*Provided*, That in all cases hereafter so certified the said accounting officers shall, in stating balances, follow the decisions of the United States Supreme Court or of the Court of Claims of the United States after the time for appeal has expired, if no appeal be taken, without regard to former settlements or adjudications by their pre-

decessors." Public Act No. 253, 59th Congress, Second Session, page 70.

This proviso, while following an appropriation for a particular object, constitutes, upon principles enunciated in numerous recent decisions of this court, independent and general legislation.

Georgia Banking Co. v. *Smith*, 128 U. S. 174, 181;
Telephone Company v. *Manning*, 186 U. S. 138;
United States v. *Whitridge*, 197 U. S. 135, 143;
United States v. *Falk*, 204 U. S. 143, 148.

The duty of the accounting officers to follow the decisions of this court and the Court of Claims not appealed from, which the Court of Claims in the *Meigs* case above cited deduced from prior legislation, has now received express statutory sanction. The application to passed assistant surgeons of the decision of the Court of Claims in the *Richardson* case in favor of mounted pay to assistant surgeons was not only a reasonable, but a necessary deduction from that decision. It should not, at this late date, be overturned.

Conclusion.

Passed assistant surgeons are therefore entitled to mounted pay, ranking as they do with officers of the same grade in the Medical Corps in the army. This is true as an original proposition. Even could there be any original doubt about it, the acquiescence of the Government in the *Richardson* decision of the Court of Claims and the long continued application of that decision in practice to passed assistant surgeons should now prevent the question being reopened to the prejudice of the officers.

The judgment of the Court of Claims should be affirmed.

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